

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Connect America Fund)	WC Docket No. 10-90

FURTHER NOTICE OF PROPOSED RULEMAKING

**COMMENTS OF
MESCALERO APACHE TELECOM, INC.**

January 28, 2013

INTRODUCTION

Mescalero Apache Telecom, Inc. (MATI) hereby submits its Comments to the Federal Communications Commission (FCC or Commission) in response to the Further Notice of Proposed Rulemaking regarding potential modifications to rules governing the Connect America Fund (CAF) Phase I program (*FNPRM*).¹

MATI was formed for the purpose of bringing modern communications services to the people of the Mescalero Apache Reservation. MATI serves the Mescalero Apache Reservation, an area consisting of approximately 720 square miles in south central New Mexico. MATI, as a wholly owned enterprise of the Mescalero Apache Tribe, undertook the risky venture of serving a historically underserved and economically disadvantaged area in order to afford the Mescalero Apache people with access to telecommunications, including access to interexchange services, advanced telecommunications, and information services, and thereby increase the Tribe's access to education, commerce, government, and public services. MATI, by taking the steps it did, also helped bridge the physical distances between those living on the Reservation and the emergency, medical, employment, and other services that they may need to improve the standard of living on the Reservation. MATI continues its commitment to provide service to the Reservation, which now, as with the rest of the United States, must include investment in broadband capable services.

MATI offers these comments to propose an alternative to the options contained in the *FNPRM* for distribution of unclaimed CAF Phase I support. In summary, MATI believes the Commission can, and should, allocate the unused CAF Phase I support to areas where the support is needed: specifically, Tribal areas impacted by other FCC USF and ICC reforms.

¹ WC Docket No. 10-90, In the Matter of Connect America Fund, *Further Notice of Proposed Rulemaking*, FCC 12-138, released November 19, 2012.

**I. PRICE CAP CARRIERS DID NOT ACCEPT A MAJORITY OF THE CAF
PHASE I SUPPORT MADE AVAILABLE**

While it is clear that the price cap carriers to whom CAF Phase I support was targeted declined over 60% of the support made available, it is not clear why two of the largest price cap carriers, AT&T and Verizon, decided to forego the support. AT&T stated, somewhat opaquely, its acceptance of funding would depend “in part on whether it would be potentially subject to service obligations that may be adopted only after AT&T’s decision is made.”² Other than that, MATI could find no other reasons for price cap carriers to turn down over \$185 million of federal support. Most of the unclaimed support can be tied to four carriers - AT&T, CenturyLink, Verizon, and Windstream.

The original plan offered by a group of price cap carriers³, which included AT&T, CenturyLink, Verizon, and Windstream, placed substantial emphasis on narrowing “the rural-rural divide”⁴ and helping bring broadband to an estimated 4 million households.⁵ The Commission, in adopting the CAF Phase I process, hoped the funding would “provide an immediate boost to broadband deployment in areas that are unserved by any broadband provider.”⁶ In addition, the Commission thought CAF Phase I would “enable additional deployment beyond what carriers would otherwise undertake, absent this reform.”⁷ The facts and results of the “first round” of CAF Phase I funding tell a different story: two carriers (AT&T and Verizon) refused all support, one carrier (CenturyLink) accepted only 39% of the funding to which it was entitled, and another carrier refused almost all support, but conditioned receipt of all support based on a petition for waiver (Windstream). MATI is not attempting to ascertain why these carriers refused support, but the fact remains these proponents of the ABC Plan saw fit to refuse CAF Phase I support to

² AT&T Notice of Ex Parte Presentation (July 23, 2012), filed in WC Docket No. 10-90, et al.

³ See July 29, 2011 submission of the ABC Plan in WC Docket 10-90, et al.

⁴ ABC Plan (July 29, 2011) Attachment 1, at 2

⁵ See October 10, 2011 letter from ABC plan sponsors, filed in WC Docket 10-90 et al.

⁶ Report and Order and Further Notice of Proposed Rulemaking (rel. 11/18/2011) in WC Docket 10-90, et al (*ICC/USF Order*) at 137

⁷ *Id.*

the extent that a vast majority of the unserved households will either have to do without broadband, or wait until the CAF Phase II process has been implemented.⁸

The Commission now, in essence, seeks to further incent the price cap carriers to accept funding in future rounds of CAF Phase I or add to the funding available in CAF Phase II by revising its rules. While MATI believes the Commission is warranted in attempting to determine how to allocate these unclaimed funds, trying to provide more funding to carriers who plainly do not want or need such funding is the wrong approach to take.

II. THE COMMISSION SHOULD CONSIDER OTHER ALTERNATIVES FOR UNUSED PHASE I CAF SUPPORT

In the FNPRM, the Commission discusses two basic options for utilizing the remaining 2012 CAF Phase I funding - 1) adopt modifications to its rules to be used in a new round of CAF Phase I funding, or 2) transfer the funding to CAF Phase II. However, MATI believes the Commission has additional alternatives, and indeed discussed some of these options in the *ICC/USF Order*.

Instead of attempting to provide more support to price cap carriers that either do not want or do not need the support for bringing broadband to unserved areas, the Commission should consider options such as were contemplated in the *ICC/USF Order*. Specifically, the Commission stated “to the extent incremental support is declined, it may be used in other ways to advance our broadband objectives pursuant to our statutory authority.”⁹ In the footnote to this statement, the Commission provided an example: “to the extent that savings are available from the CAF programs, the Commission could reallocate that funding for broadband adoption programs...”¹⁰ Clearly, the Commission foresaw Phase I CAF support being unclaimed and spelled out some alternatives for its use. MATI suggests that the Commission should explore options in addition

⁸ MATI notes that, under CAF Phase II, price cap carriers may decline a statewide commitment to deploy broadband, thus potentially leaving impacted customers to hope the competitive bidding process results in a winning bidder that is able to provide quality service.

⁹ *ICC/USF Order* at 138

¹⁰ *Id.*, footnote 221

to those contained in the *ICC/USF Order* and FNPRM that exist within its statutory authority, and that advance national broadband goals.

The Commission is clearly within its statutory authority to ensure broadband goals are being adequately addressed.¹¹ For CAF Phase I funding, the Commission attempted to “jump start” broadband deployment to those areas most in need¹² - those served by price cap carriers and that had been historically under- or un-served.¹³ Some price cap carriers, in the amount of \$115 million in the aggregate, determined the trade-off between support and the Commission’s newly-adopted public interest obligations was worth it and accepted support. However, it must be assumed that the other carriers, and related to the remaining \$185 million, decided the opposite, and now it is up to the Commission to determine where this budgeted funding can do the most good. MATI believes allocating this support to Tribal areas, and to those carriers that are Tribally-owned, is the best alternative and will provide the most value for the available funding.

III. THE COMMISSION’S USF AND ICC REFORMS HAVE MADE IT MORE DIFFICULT FOR TRIBAL AREAS TO SECURE BROADBAND SERVICES

As stated above, MATI is a Tribally-owned carrier, and, as a rate-of-return (RoR) regulated carrier serving only Tribal areas, was impacted by the *ICC/USF Order*.¹⁴ In conjunction with the Commission’s short term broadband build out requirements for RoR carriers¹⁵, and the long term goal of ubiquitous broadband availability, anything but a net increase in support for Tribal areas would in essence constitute an “unfunded mandate.” And yet, this is the exact situation in which MATI, and many similarly-situated carriers, finds itself - being told to do more with less. However, in the case of Tribal areas, the Commission has additional standards to consider.

¹¹ See *ICC/USF Order* at 60-73

¹² In fact, MATI notes that the Commission adopted a similar “jump starting” process for wireless mobility in Tribal areas (*ICC/USF Order* at 481). However, MATI notes that a similar process was not adopted for Tribally-owned, RoR regulated, wireline broadband providers.

¹³ MATI has firsthand knowledge about how areas served by price cap carriers can be severely underserved - MATI’s entire service area was formerly served by GTE, a predecessor of Verizon, and was historically and chronically underserved until MATI purchased the relevant assets.

¹⁴ See MATI Comments (January 18, 2012) and Reply Comments (February 17, 2012) filed in WC Docket 10-90, et al.

¹⁵ See *ICC/USF Order* at 205-209

As the Commission is aware, it is obligated to operate under a government-to-government arrangement with Tribal governments. As MATI has argued previously¹⁶, the Commission did not properly consult with Tribal authorities prior to making changes that would affect communications services on Tribal areas.¹⁷ Furthermore, Executive Order 13175 states in part “in order to establish regular and meaningful consultation and collaboration with tribal officials in the development of Federal policies that have tribal implications, to strengthen the United States government-to-government relationships with Indian tribes, and to reduce the imposition of **unfunded mandates** upon Indian tribes...” (emphasis added) Clearly, it is the overall policy of the United States, as communicated through this Executive Order, to work as closely as possible with Tribal authorities to avoid such circumstances as were created by the *ICC/USF Order* - where Tribally-owned carriers are required to implement national broadband goals but with less support than was provided under the previous “voice-centric” universal service regime. Furthermore, it is vital for the Commission, especially when major changes are adopted in regards to communications policy, to recognize differing cultures and economies as represented by Tribal areas, and not adopt “one-size-fits-all” policies. These types of policies will not often work in Tribal areas, and recognizing this was undoubtedly a contributing factor into the development of the Commission’s Statement of Policy on Establishing a Government-to-Government Relationship with Indian Tribes and Executive Order 13175.

While MATI has greatly enhanced access to voice and data services to the residents and businesses of the Mescalero Apache reservation, more work remains to be done, investments made, people to reach, and a network still needs to be operated. As the Commission recognized, in order to best promote broadband availability on Tribal lands, substantially greater financial support is needed than is presently available.¹⁸ However, the results of the *ICC/USF Order* had the opposite effect, thus far, and the Commission now has an opportunity to remedy at least a portion of this error.

¹⁶ See MATI Reply Comments (February 17, 2012) at 6

¹⁷ Commission’s Statement of Policy on Establishing a Government-to-Government Relationship with Indian Tribes (June 23, 2000) at 4

¹⁸ National Broadband Plan, Chapter 8, Box 8-4

IV. UNCLAIMED PHASE I CAF SUPPORT SHOULD BE ALLOCATED TO TRIBAL AREAS

Instead of providing more funding to price cap areas where it clearly is not wanted or needed, the Commission should heed its own advice and use the declined CAF Phase I support “in other ways to advance our broadband objectives.”¹⁹ MATI suggests the Commission allocate the unclaimed and unwanted CAF Phase I support amount (\$185 million) to Tribal areas. This funding should be provided to Tribal authorities under the conditions that it be used to further national broadband goals and to meet Congress’ directive that “all people of the United States have access to broadband capability.”²⁰ However, no other conditions are necessary nor should be attached to the receipt of such support - Tribal governments should be granted the maximum administrative discretion possible²¹ and the Commission should defer to Indian Tribes to establish standards²², such as those necessary to allocate broadband support funds.

The unique circumstances related to serving Tribal areas have been recognized by the Commission: “tribally-owned and operated carriers serve cyclically impoverished communities with a historical lack of critical infrastructure. Reservation-based economies lack fundamental similarities to non-reservation economies and are among the most impoverished economies in the country.”²³ Due to this, and the fact that it is the policy of the United States to recognize the rights of tribes to self-government, the Commission should ensure Tribal areas and Tribally-owned carriers are provided the resources to enable Tribal residents to have access to the tools necessary to succeed in today’s world. One of those tools is access to quality, reasonably-priced broadband services. To date, the Commission’s efforts to reform universal service and intercarrier compensation policies have led to more obligations, more uncertainty, and less resources.

¹⁹ *ICC/USF Order* at 138

²⁰ American Recovery and Reinvestment Act of 2009, § 6001(k)(2)(D)

²¹ Executive Order 13175. § 3(b)

²² *Id.*, § 3(c)(2)

²³ *ICC/USF Order* at 1059

MATI has been forced to reduce costs, including by reducing its work force, in order to operate under the Commission's revised rules. Besides exacerbating an already tenuous employment situation on the Mescalero Apache reservation, it also causes problems with MATI's quality of service. Prior to the *ICC/USF Order*, MATI was operating as efficiently as possible and, as a result, exhibited a high quality of service with few outages or complaints. With 18 fewer employees (approximately 33% of MATI's work force), not only is this high quality of service threatened, but so is MATI's ability to effectively maintain and operate its network. In general, the changes adopted in and uncertainty caused by the *ICC/USF Order* has compelled MATI to shift its planning priorities from expansion of services through continued reinvestment to a desperate attempt to sustain current operations with reduced funding.

While the Commission did adopt a waiver process for companies to address problems caused by the *ICC/USF Order*²⁴, it has proven to be a difficult, time consuming, expensive, and many times a futile endeavor.²⁵ Even with the further guidance and clarifications provided by the Commission²⁶, it is not likely that MATI will rationally be able to avail itself of this waiver process - it makes little sense to expend the time (with 33% fewer employees) and money (with lower support levels) to file a petition with questionable odds of succeeding.

Given a new source of support for bringing broadband services to all Tribal residents, Tribally-owned carriers, such as MATI, would be able to invest in new infrastructure, consider new and different technologies to reach the highest cost areas, and to better meet broadband public interest obligations such as speed (4mbps down / 1mbps up), latency, and capacity. By providing the support to Tribes, carriers serving these areas could avoid the sometimes esoteric and entirely irrelevant rules governing available support programs.²⁷ For Tribal areas, and especially for Tribally-owned carriers, the Commission's efforts at intercarrier compensation and

²⁴ *ICC/USF Order* at 539-544

²⁵ See e.g., Petition for Waiver of Cordova Wireless Communications, Inc. (October 1, 2012) in WC Docket No. 10-90 and WT Docket No.10-208; see also Order (rel. January 14, 2013) in WC Docket No. 10-90 and WT Docket No. 10-208 that denied Cordova's petition.

²⁶ See Fifth Order on Reconsideration (November 16, 2012) in WC Docket No. 10-90, et al., at 18-32

²⁷ See MATI Comments in WC Docket No. 10-90 and WT Docket No. 10-208 (filed December 21, 2012), in response to the Further Inquiry into Issues Related to Mobility Fund Phase II. MATI noted the inability to obtain a Letter of Credit necessary to participate in the Mobility Fund Phase II process.

universal service fund reform have resulted in yet more uncertainty, at a time when a dose of certainty would go a long way to solving the issue of providing broadband services to as many Tribal residents as possible. One way the Commission could provide some certainty to Tribal areas is to allocate unwanted Phase I CAF support to Tribal areas, where MATI believes it is very much wanted and needed.

CONCLUSION

MATI recommends the Commission seek other alternatives as to the dispensation of the unclaimed and unwanted CAF Phase I support amounts. The price cap carriers made, it must be assumed, reasonable and rational decisions to reject \$185 million in support funds, and to attempt to find ways to incent these carriers to take such support is most likely futile. Instead, the Commission should allocate these funds to Tribal governments to be used to further national broadband goals. By allocating funding to Tribal areas, the Commission has an opportunity to assist Tribal governments in mitigating some of the harm and uncertainty caused by the *ICC/USF Order*, and in the process ensure these historically un- and under-served areas are provided the opportunity to participate in the world made available by quality, reasonably-priced broadband services.

Respectfully Submitted,

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